

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF TEXAS
3 WACO DIVISION

4 GABRIEL DE LA VEGA) Docket No. WA 19-CA-612 ADA
5)
6 vs.) Waco, Texas
7)
8 MICROSOFT CORPORATION) January 31, 2020
9 -----

10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF TEXAS
12 WACO DIVISION

13 GABRIEL DE LA VEGA) Docket No. WA 19-CA-617 ADA
14)
15 vs.) Waco, Texas
16)
17 GOOGLE, LLC) January 31, 2020

18 TRANSCRIPT OF MOTION HEARING
19 BEFORE THE HONORABLE ALAN D. ALBRIGHT

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25 Proceedings reported by computerized stenography,
transcript produced by computer.

10:14:20 1 THE COURT: The next case I have in front of me
10:14:23 2 is De La Vega vs. Microsoft and vs. Google. And -- yes,
10:14:23 3 sir.

10:14:27 4 MR. DEVOOGD: Andrew Devoogd, your Honor. I
10:14:29 5 apologize for interrupting.

10:14:30 6 THE COURT: No.

10:14:31 7 MR. DEVOOGD: Counsel for defendants in the Parus
10:14:33 8 matters reminded me that I neglected to tell you that we
10:14:37 9 are no longer proceeding with our injunctive relief
10:14:39 10 claims. That was also the subject of some of the
10:14:42 11 briefing. So we will be withdrawing those allegations.

10:14:45 12 THE COURT: Okay. Very good.

10:14:47 13 MR. DEVOOGD: Thank you, your Honor.

10:14:48 14 THE COURT: You're doing that voluntarily. I'm
10:14:50 15 not.

10:14:51 16 MR. DEVOOGD: That is correct. Streamlining the
10:14:54 17 case.

10:14:54 18 THE COURT: Very good.

10:14:55 19 MR. DEVOOGD: Thank you.

10:14:56 20 THE COURT: Who is here for De La Vega?

10:14:59 21 MR. O'FINAN: I'm Paul O'Finan for De La Vega.

10:15:06 22 And Mr. Austin Hansley is here with me. And Mr. Gabriel
10:15:10 23 De La Vega is in the gallery, your Honor. He's here.

10:15:15 24 THE COURT: Very good.

10:15:15 25 MR. HANSLEY: And, your Honor, I currently have

10:15:17 1 an application pending for admission.

10:15:18 2 THE COURT: No. We denied it.

10:15:20 3 MR. HANSLEY: Well, no. I have a full
10:15:22 4 application, not just a pro hac.

10:15:23 5 THE COURT: You have a full application pending?
10:15:25 6 Okay. We denied the pro hac for that reason is I didn't
10:15:29 7 realize you had a full application pending, and that's all
10:15:32 8 I was going to tell you to do here today was, I wanted you
10:15:36 9 to go through the full application process.

10:15:39 10 MR. O'FINAN: He has done that, your Honor. He
10:15:40 11 has done that.

10:15:41 12 THE COURT: Have you been admitted?

10:15:42 13 MR. O'FINAN: We're waiting.

10:15:43 14 THE COURT: Oh, I understand.

10:15:45 15 MR. HANSLEY: I've submitted the application.
10:15:46 16 I've taken the course. I've sent two recommendation
10:15:50 17 letters with signatures in ink, and I've paid the fee, and
10:15:56 18 that was roughly a week ago, ten days ago.

10:16:00 19 THE COURT: Okay. As soon as you are -- as soon
10:16:03 20 as that -- they admit you, then you'll be obviously free
10:16:07 21 to appear here.

10:16:08 22 MR. HANSLEY: Okay.

10:16:08 23 THE COURT: I was unaware you had filed a formal
10:16:12 24 application. I just knew you had done the pro hac and
10:16:17 25 you've filed a couple of cases here. I wanted it not to

10:16:21 1 be on a continual pro hac basis. I wanted you to go
10:16:24 2 through the full -- I was just unaware you did that. In
10:16:26 3 other words, you did exactly the right thing and I'm glad
10:16:28 4 you did it already.

10:16:29 5 MR. HANSLEY: Your Honor, I actually filed the
10:16:31 6 application before I filed the pro hacs, but I thought
10:16:35 7 some circumstances arose where I thought that I was going
10:16:38 8 to need to -- it was necessary for me to be here today.
10:16:41 9 And so, I filed the pro hac motions because they hadn't
10:16:45 10 given notice of the full application.

10:16:48 11 THE COURT: Well, then, you did exactly the right
10:16:49 12 thing.

10:16:49 13 MR. O'FINAN: Your Honor, would you be willing to
10:16:51 14 reconsider the pro hac motion since he did follow the
10:16:54 15 admission requirements to file for admission? He was not
10:16:57 16 going to continually just be pro hac all the time. So
10:17:00 17 he's done that.

10:17:01 18 So would the Court be willing to reconsider
10:17:03 19 admitting him pro hac for the purpose of the De La Vega
10:17:06 20 case today?

10:17:06 21 THE COURT: For the purpose of the De La Vega
10:17:08 22 case today, I will.

10:17:10 23 MR. O'FINAN: Thank you, your Honor.

10:17:14 24 MR. SHELTON: Your Honor, Barry Shelton of
10:17:17 25 Shelton Coburn, LLP for Microsoft.

10:17:18 1 THE COURT: You're getting a lot of cases.

10:17:20 2 That's wonderful, Mr. Shelton. And then, behind you?

10:17:23 3 MR. JONES: Your Honor, Mike Jones for Google.

10:17:25 4 And here, also representing Google, is Mr. Kevin McGann
10:17:29 5 and Mr. --

10:17:30 6 MR. MCGANN: Good morning, your Honor.

10:17:32 7 MR. JONES: -- Scott Baker. And also here from
10:17:34 8 Google itself is Mr. Howard Chin. And, your Honor, we
10:17:37 9 also have an issue with regard to my co-counsel, Mr.
10:17:40 10 McGann and Mr. Baker in that they have applied for
10:17:43 11 admission. They have been accepted, they received the
10:17:46 12 e-mail that says they need to be sworn in. So we would --

10:17:49 13 THE COURT: I'm happy to do that while they're
10:17:51 14 here today.

10:17:52 15 MR. JONES: Thank you, sir.

10:17:54 16 THE COURT: The last time I think I saw you, Mr.
10:17:55 17 Jones, you were beating up on me in a case in Tyler and
10:17:58 18 doing a great job of it, so I think it's been long enough,
10:18:00 19 I can forget that now. But you did a great job for your
10:18:04 20 client in that case.

10:18:06 21 MR. JONES: I remember it very differently, your
10:18:10 22 Honor, as to who got the beating.

10:18:11 23 THE COURT: Judge Davis gave a great trial for
10:18:14 24 sure.

10:18:15 25 MR. JONES: Yes, sir.

10:18:16 1 THE COURT: You all may be seated, but don't get
10:18:18 2 away without me swearing you in.

10:18:20 3 So you all -- by "you all," the attorneys who are
10:18:27 4 on this case sat through, I believe, the other hearing.
10:18:31 5 Let me start with Microsoft's counsel, Mr. Shelton.

10:18:40 6 Do you have any issues with the methodology that
10:18:42 7 I suggested in the other cases?

10:18:45 8 MR. SHELTON: No, your Honor.

10:18:45 9 But the issues in the De La Vega cases, I submit,
10:18:49 10 are quite different, at least for Microsoft. And so, I
10:18:53 11 don't believe that your Honor's guidance helps.

10:18:57 12 THE COURT: Well, I'm aware that there is a --
10:18:59 13 y'all's is a much more substantive motion to dismiss on
10:19:02 14 the merits, correct?

10:19:03 15 MR. SHELTON: Yes, your Honor.

10:19:04 16 THE COURT: Okay. Did you want to take that up
10:19:05 17 this morning?

10:19:06 18 MR. SHELTON: Your Honor, if I may propose that
10:19:08 19 Google go first.

10:19:09 20 THE COURT: Okay.

10:19:10 21 MR. SHELTON: Which is unusual for a trial lawyer
10:19:12 22 to suggest, but they have more issues than, quite frankly,
10:19:16 23 the Microsoft motion.

10:19:16 24 THE COURT: Okay. Very good.

10:19:40 25 MR. SHELTON: Thank you, your Honor.

10:19:40 1 MR. MCGANN: Good morning, your Honor. Kevin
10:19:41 2 McGann for Fenwick & West for Google today.

10:19:45 3 I don't know if you want to tend to the swearing
10:19:47 4 in with us. But I appreciate it.

10:19:49 5 Your Honor, I did prepare a couple of items that
10:19:54 6 if there's -- simply because the record evidence may be
10:19:57 7 easier, more accessible, if your Honor would like it.

10:20:00 8 THE COURT: Okay.

10:20:01 9 MR. MCGANN: May I approach?

10:20:03 10 THE COURT: And have you met Josh Yi, my clerk?

10:20:05 11 MR. MCGANN: We did.

10:20:06 12 THE COURT: Very good.

10:20:14 13 MR. MCGANN: So, your Honor, I'm mindful of the
10:20:17 14 issues you have already addressed, and I'll try not to
10:20:21 15 repeat any of those.

10:20:22 16 The thing I would call out to your Honor that I
10:20:25 17 think is different here in this case with De La Vega and
10:20:28 18 Google is, there's a direct attack on the direct
10:20:31 19 infringement claims, okay? That puts us in a very
10:20:34 20 different situation. The problem arises because of the
10:20:42 21 way the claims are structured. And we put in on the first
10:20:45 22 page of what we've provided to your Honor the chart that
10:20:47 23 we had in our brief that shows claim 1 and the allegations
10:20:52 24 of the complaint. And I think when you look at that, it
10:20:57 25 makes clear that there's multiple actors required, okay?

1 You have a content providing the person who's
2 taking a video while in motion, and they have to couple to
3 the cellular network. Then you have the network and the
4 provider, which, presumably, they're accusing with
5 YouTube. And then, you have a viewing user, who, on the
6 back end of all this, has to do filtering and selecting.
7 So we have at least three different actors. And that
8 makes us a very different case than a straightforward
9 direct infringement case, your Honor.

10 And I don't need to go into the detail, but what
11 we've done in figure 2, just as to give you the background
12 of the patent -- this is page 2, showing all the different
13 parties involved. And you have -- the flaw here is -- and
14 we've pointed it out in our briefing is, in a joint
15 infringement case -- and this is Lyda tells us this, you
16 have to allege some sort of direction and control or some
17 joint enterprise in order to attribute the acts of one of
18 the actors to the other. You can't have three people
19 acting separately, just mash together willy-nilly and have
20 a direct infringement claim.

21 And the complaint has no allegations with respect
22 to direction and control or anything that would support a
23 joint infringement claim. Now, as we point out in our
24 briefing, actually, some of these steps, they don't say
25 anything at all about doing them. The coupling stuff, for

10:22:35 1 example, and that's the one where the person who has the
10:22:39 2 phone has to be connected to the cellular network and
10:22:42 3 taking video while in motion. They say nothing about
10:22:48 4 that, who's doing that or how it's being done.

10:22:51 5 THE COURT: Or how there's any inducement of
10:22:53 6 that.

10:22:54 7 MR. MCGANN: How there's any control even for
10:22:56 8 direct infringement. How plausibly does YouTube make
10:23:00 9 somebody move? How would YouTube control them to move in
10:23:04 10 the cellular network?

10:23:05 11 THE COURT: Right.

10:23:06 12 MR. MCGANN: So I think there's a basic flaw in
10:23:10 13 the claim that they've put forth for direct infringement.
10:23:14 14 There's also, your Honor -- and I'm happy if you have any
10:23:17 15 questions on that.

10:23:18 16 THE COURT: No. We've been through -- my clerk
10:23:20 17 and I have been through both of that for both you and
10:23:23 18 Microsoft. He's given me a pretty good idea of what the
10:23:27 19 case is about.

10:23:27 20 MR. MCGANN: Okay. I will try to move along
10:23:30 21 then, your Honor.

10:23:30 22 We also have a similar problem with claim 9,
10:23:34 23 although the complaint is very -- essentially doesn't say
10:23:37 24 anything other than there is a claim 9. It doesn't say
10:23:39 25 anything about who's infringing it or how. But that's a

1 system claim. And if you look at page 6 of what we've
2 provided your Honor, the law there requires that for use
3 of a system claim, the alleged direct infringer must
4 control, directly or indirectly, all the elements and must
5 benefit from all the elements.

6 There's no allegations in the complaint that
7 relate to that at all. They don't address claim -- they
8 really don't address claim 9, but they certainly don't
9 address the controller benefit. And then, the response to
10 our motion, the plaintiff simply says, well, defendants
11 put the system in claim 9 into use and are controlling and
12 gaining a benefit.

13 First of all, it's not in their complaint and,
14 second of all, that's insufficient as it's the Grecia case
15 applying Intellectual Ventures that dismissed claims on
16 that basis because generalized allegations of control or
17 benefit from the system as a whole are insufficient.
18 Okay. And that's cited in our papers. It's also listed
19 there on slide 6.

20 So, your Honor, in short, I don't think there is
21 any claim made out, any plausible claim for direct
22 infringement in the first place. Obviously without the
23 direct infringement claims, the indirect fail.

24 THE COURT: Right.

25 MR. MCGANN: Now, your Honor, we've also

10:25:11 1 addressed the other shortcomings related to intent, and
10:25:14 2 things like that, but I think your Honor's already taken
10:25:17 3 those up today, and I don't need to belabor those points.
10:25:22 4 Obviously there's no pre-suit notice. There's no
10:25:25 5 willfulness in our case, okay?

10:25:28 6 The allegations of intent are nothing more than
10:25:31 7 they had intent. There's no facts to suggest there's any
10:25:36 8 -- and when you look at the claim here, the actual patent
10:25:39 9 claim, you know, the intent to have somebody take video
10:25:42 10 while in motion. I mean, this is not -- this is a stretch
10:25:46 11 on plausibility to begin with.

10:25:48 12 THE COURT: Why don't you take up the issue you
10:25:51 13 have a notice of abandonment on page 9.

10:25:55 14 MR. MCGANN: Yes.

10:25:56 15 So, your Honor, there's also cases that --
10:25:57 16 somewhat interesting and unique because the applicant
10:26:00 17 abandoned the application for eight-and-a-half years. And
10:26:03 18 if you look the notice of abandonment you referred to on
10:26:07 19 page 9, the attorney of record during the application
10:26:11 20 process was notified by the examiner and confirmed that
10:26:14 21 nothing was submitted.

10:26:16 22 Okay. So it's not a case of somebody forgot a
10:26:22 23 deadline, somebody missed something. The attorney who was
10:26:23 24 prosecuting the application confirmed nothing was
10:26:26 25 submitted. Eight-and-a-half years later, presumably

1 because of second thoughts, or some other reason, the
2 applicant tried to revive the application. And we put in
3 the statement of the reasons for unintentional delay;
4 that's page 10 in what we provided your Honor.

5 The explanation was an inability to pay
6 attorneys' fees. Okay. While we can all decide whether
7 that's -- for eight-and-a-half years, whether that's
8 correct or he could have prosecuted the application on his
9 own, it doesn't change the fact that the standard for
10 unintentional delay that the patent office is supposed to
11 apply eliminates deliberate choices.

12 THE COURT: Let me ask you two things. First is,
13 is this an issue -- I will admit to you, I've not dealt
14 with this before sitting here. Is this an issue that
15 should be taken up at a motion to dismiss stage or it may
16 be a 12(c)? Or would it be better under a rule -- a
17 summary judgment motion?

18 And let me tell you why I'm asking that is -- in
19 part, is if the statement here's why we have the
20 unintentional delay is whatever it is, he says here, you
21 know, I couldn't afford to pay attorneys' fees, or
22 whatever it is. Is that a fact issue that I have to
23 resolve? I mean, I get -- you don't have to spend a lot
24 of time on saying eight-and-a-half years is a long time.
25 I get that.

10:28:04 1 And my questions are, when -- what is the stage
10:28:08 2 at which you think is appropriate for a court to deal with
10:28:12 3 that? And how should the Court take into consideration
10:28:16 4 whatever excuse -- I'm not being pejorative, but whatever
10:28:21 5 reason the inventor gives for the delay?

10:28:26 6 MR. MCGANN: Well, your Honor, I'd submit that
10:28:28 7 you can take it up in the context of a 12(b)(6), like we
10:28:31 8 have raised it. I certainly think you could take it up in
10:28:34 9 a judgment on pleadings or on a summary judgment. But the
10:28:38 10 case we cited in our briefing is Camp vs. Pitts, where the
10:28:42 11 courts instructed that when considering whether the
10:28:45 12 actions of an administrative agency are correct, the Court
10:28:49 13 doesn't need to do its own factfinding. The Court should
10:28:54 14 take the administrative record and use that record.

10:28:58 15 THE COURT well, here's my concern there, as well.
10:29:02 16 It sounds to me a little bit like what you're saying is
10:29:06 17 that eight-and-a-half years is almost as a matter of I
10:29:11 18 oughta decide as a matter of law, that's too long. And
10:29:17 19 because he has articulated an excuse. I'm not saying that
10:29:23 20 excuse has great merit or doesn't have great merit. But
10:29:25 21 in a situation where -- and, again, I don't know -- I know
10:29:31 22 a little bit about patent law but not, you know, all this
10:29:34 23 stuff.

10:29:37 24 I think everyone on this side of the table at
10:29:39 25 least knows how little I know about patent law because

10:29:43 1 they've all had to work with me. But is it a bright-line
10:29:48 2 rule that you're advocating? And I'm not saying I
10:29:49 3 wouldn't do that. I think eight-and-a-half years is a --
10:29:55 4 may be a bright line I would be willing to say is correct.
10:29:59 5 But I'm not sure that that's the right way to do it.

10:30:03 6 MR. MCGANN: So, your Honor, I think that your
10:30:06 7 inclination that eight-and-a-half years sort of -- at some
10:30:11 8 point, we've crossed over from the realm of somebody who
10:30:14 9 missed a deadline to somebody -- it's not -- there was a
10:30:18 10 deliberate choice. But we're not asking you to do that,
10:30:21 11 your Honor, because I think the cases and there's three
10:30:25 12 district court cases that we cited to your Honor -- point
10:30:28 13 out that what you have is the -- if you look at -- this is
10:30:31 14 page 11 in what we've submitted to your Honor today.
10:30:34 15 We've pulled out the excerpt from -- this is the patent
10:30:38 16 office's regulations. It's 1.137, I believe, your Honor.
10:30:43 17 And it describes what the patent office is supposed to
10:30:46 18 apply to determine whether an abandonment was
10:30:49 19 unintentional.

10:30:51 20 What these rule -- what the patent office's own
10:30:54 21 guidance tells you is, it's not -- when you take a
10:30:58 22 deliberate course of action, the inability to pay or the
10:31:02 23 decision not to pay because you didn't have -- you didn't
10:31:05 24 want to spend your money there and then, circumstances
10:31:07 25 have changed.

1 THE COURT: But is it really my job? What I mean
2 by that is, if an examiner determined that an
3 eight-and-a-half-year delay wasn't too long -- I mean, it
4 wasn't lost on the examiner, was it, that -- I mean, it
5 had been around a while. And if they still allow the
6 patent to be issued on whatever excuse or reason -- again,
7 I don't mean to be pejorative to the inventor, because I
8 don't have any idea why he did what he did. But if the
9 patent office is aware -- my understanding is on page 10,
10 this is a statement that was made to the patent office of
11 why there was an unintentional delay, and if the patent
12 office says that's okay with them, why should I decide
13 that that wasn't okay? What authority do I have to do
14 that?

15 MR. MCGANN: Well, I think we have the issue of
16 whether the patent office followed its own guidance. If
17 you look at what they said guidance says, but they didn't
18 follow it.

19 THE COURT: Is that for me to decide?

20 MR. MCGANN: Well, I think that's one option for
21 your Honor to decide --

22 THE COURT: I know the commissioner, I could call
23 him and say -- I've gotten to meet him. I could say, this
24 seems like a really long time and y'all shouldn't do it.
25 But I'm worried about me, as a judge, saying to an

10:32:31 1 examiner that -- again, I'm --

10:32:35 2 MR. MCGANN: Let me step back. I skipped over.

10:32:38 3 I started to mention the three district court cases that

10:32:40 4 we've cited in our briefing. It's Fields, Lawman and NYU.

10:32:45 5 The district courts did just that. They looked at it and

10:32:49 6 said, just like what we have here, the examiner called the

10:32:53 7 attorney of record, and the attorney of record confirmed

10:32:56 8 nothing was submitted that would avoid abandonment.

10:33:02 9 That's the bottom of page 9 of what we provided your

10:33:04 10 Honor. That fact was present in all three of those cases.

10:33:06 11 It's not -- it's actually not the examiner who

10:33:09 12 decides the petition. There's a different branch decides

10:33:13 13 the petition prior to the examiner doing it.

10:33:16 14 THE COURT: So a different division decides

10:33:17 15 whether or not the delay's been too long?

10:33:20 16 MR. MCGANN: Correct.

10:33:20 17 THE COURT: And then, it goes back -- if they say

10:33:23 18 it has, then it goes back to the examiner to decide

10:33:26 19 whether or not to allow it?

10:33:28 20 MR. MCGANN: The office of petitions decides

10:33:30 21 whether to allow the petition to revive, and the examiner,

10:33:32 22 if it's revived, has to continue; and if it's not --

10:33:34 23 THE COURT: Doesn't that hurt you because doesn't

10:33:36 24 that tell me that an administrative group at the PTO

10:33:39 25 looked at this issue and said -- and put a little holy

1 water on it and said, this is fine, and sent it back to
2 examiner and then, the examiner allowed it?

3 MR. MCGANN: Except the three cases that we cited
4 recognize, your Honor, the patent office in that case is
5 not -- has ignored what the examiner did. The examiner's
6 actions in calling and confirming nothing was submitted.
7 They didn't -- there's no suggestion that it was, oh, we
8 made a mistake, we missed the deadline. The attorney who
9 was representing the applicant -- and that was applicant's
10 choice. You know, maybe they didn't, for whatever reason,
11 communicate. But the attorney told the patent office, no,
12 we didn't submit anything. There was no unintentional
13 delay. There was, we're not submitting anything.

14 And in each of the three cases we cited, your
15 Honor, the Fields, Lawman and NYU, had the same fact, and
16 what the courts found was, it was wrong for the office of
17 petitions and patent office to ignore that point that the
18 examiner had found and that there was a deliberately
19 chosen course of action.

20 THE COURT: Is there anything else you have?

21 MR. MCGANN: Your Honor, I would -- I think
22 you're probably already on top of it. If you want to
23 hear, I think the contributory infringement claim other
24 than the intent issues that your Honor's been talking
25 about today, in our case, you also have the situation

10:35:01 1 where in the complaint, there are allegations -- first of
10:35:07 2 all, they're required to allege no substantial
10:35:14 3 non-infringing use. In order to plead that claim, they
10:35:16 4 have to allege facts to make that inference plausible.

10:35:19 5 THE COURT: And they didn't.

10:35:21 6 MR. MCGANN: No. Not only did they not do it,
10:35:21 7 the facts in the complaint show there are non-infringing
10:35:24 8 uses.

10:35:24 9 THE COURT: At this stage, I'm more concerned --
10:35:25 10 I'm more interested in just the fact that they didn't
10:35:28 11 plead it.

10:35:29 12 MR. MCGANN: They not only didn't plead it, but
10:35:31 13 they included facts that show there are non-infringing
10:35:34 14 uses.

10:35:35 15 THE COURT: Okay.

10:35:35 16 MR. MCGANN: If you have no questions.

10:35:37 17 THE COURT: I don't.

10:35:39 18 MR. MCGANN: Thank you, your Honor.

10:35:40 19 MR. O'FINAN: Your Honor, if you'll permit me, I
10:35:41 20 would like to rebut the argument based on the patent
10:35:43 21 office, and Mr. Hansley is much more qualified to go into
10:35:48 22 the other issues that have been raise. So --

10:35:50 23 THE COURT: That's fine.

10:35:50 24 Mr. Shelton, does it make sense for him to go
10:35:53 25 now? Or would you like to speak for Microsoft and have

10:35:55 1 him --

10:35:55 2 MR. O'FINAN: Oh, I'm sorry, your Honor.

10:35:56 3 THE COURT: No. I'm asking you. I'm happy to
10:35:59 4 take it up. It was fine for you to stand up. I just want
10:36:02 5 to figure out between what makes the most sense here.

10:36:05 6 MR. SHELTON: Your Honor, might make more sense
10:36:06 7 for me to give a very short presentation for Microsoft so
10:36:08 8 that Mr. De La Vega's counsel can --

10:36:12 9 THE COURT: I think so, too, because y'all's
10:36:14 10 issues are relatively -- they're overlapping, right?

10:36:17 11 MR. SHELTON: Yes, your Honor. They are.

10:36:18 12 THE COURT: Okay. Yeah. We've looked at both
10:36:24 13 the Google and the Microsoft pretty closely. Go ahead.

10:36:27 14 MR. SHELTON: Thank you, your Honor.

10:36:27 15 So the Microsoft motion does not have anything
10:36:32 16 about the delay and the abandonment of the application
10:36:37 17 during prosecution, so I won't touch on that. I'll just
10:36:40 18 say that IBM and Microsoft both filed motions for early
10:36:43 19 bench trial on that issue before your Honor for
10:36:46 20 inequitable conduct and prosecution laches. So that is
10:36:51 21 very much an issue for Microsoft.

10:36:53 22 THE COURT: Actually, don't jump over that too
10:36:56 23 quickly here. Give me one second.

10:37:02 24 MR. SHELTON: Yes, your Honor.

10:37:12 25 THE COURT: It seems to me -- and I'm saying this

10:37:14 1 so counsel can address this, as well, and Google can tell
10:37:19 2 me what they think, as well. It seems to me that I could
10:37:24 3 probably do that more quickly than I could get to a
10:37:26 4 Markman, right?

10:37:27 5 MR. SHELTON: Yes, your Honor. Absolutely.

10:37:29 6 THE COURT: And so, does Google -- I've lost
10:37:33 7 where the counsel's at -- does Google have any
10:37:36 8 disagreement that a bench trial might be the right way to
10:37:40 9 go on that issue?

10:37:41 10 MR. MCGANN: Your Honor, the one complication is
10:37:45 11 Google's also filed a motion to transfer.

10:37:47 12 THE COURT: That is a complication, isn't it? I
10:37:52 13 don't know what to tell you about that.

10:37:55 14 MR. MCGANN: It also hasn't been opposed, and the
10:37:57 15 time to oppose is long past. So the --

10:38:01 16 THE COURT: Okay. So Google would rather have
10:38:02 17 the case transferred than me to dismiss it.

10:38:06 18 MR. MCGANN: No. It's not that we would rather
10:38:09 19 have you transfer it, but we wanted to in the interest of
10:38:12 20 discovery --

10:38:12 21 THE COURT: I could just not go through the brain
10:38:15 22 damage of all the stuff you just said and let some other
10:38:17 23 judge have the brain damage. Or Google could not have the
10:38:22 24 case transferred, we could have a bench trial relatively
10:38:25 25 quickly on those issues if I don't decide to dismiss the

10:38:30 1 case for other reasons. But I'm not sure you even want me
10:38:36 2 to go through the brain damage of dismissing the case if
10:38:39 3 you would rather me focus on your motion to transfer.

10:38:42 4 MR. MCGANN: No, your Honor.

10:38:43 5 I was just bringing it up so that we're clear of
10:38:46 6 -- I didn't want to misrepresent the record that this is
10:38:48 7 also why we haven't taken a position on Microsoft and
10:38:53 8 IBM's motion.

10:38:54 9 THE COURT: I gotcha. Okay. Things get
10:38:58 10 complicated.

10:38:59 11 MR. SHELTON: Yes, your Honor. But it is
10:39:01 12 actually a very simple issue. And I do agree with the
10:39:03 13 Court that an early bench trial on inequitable conduct and
10:39:07 14 prosecution laches, we think, would -- under Federal
10:39:10 15 Circuit law that's binding on this court would dispose of
10:39:13 16 this entire case.

10:39:14 17 THE COURT: Is that what -- you could do that in
10:39:16 18 about -- you could do discovery and be prepared for that
10:39:18 19 kind of hearing in about three months, right?

10:39:20 20 MR. SHELTON: Absolutely, your Honor.

10:39:22 21 THE COURT: And we could do a bench trial in
10:39:23 22 probably half a day or a day, at most?

10:39:25 23 MR. SHELTON: Yes, your Honor. We said one to
10:39:27 24 two days in our motion for the bench trial. But the
10:39:29 25 issues are so simple, and there appear to be no fact

10:39:33 1 issues that are in dispute because we'd be relying on the
10:39:38 2 affidavit that was made to the petition for revival and on
10:39:41 3 the statement that was made that -- just give the Court a
10:39:45 4 preview, the statement was made that the abandonment was
10:39:48 5 unintentional but because Mr. De La Vega could not afford
10:39:52 6 to prosecute the patent. Along the way, though, in those
10:39:55 7 eight-and-a-half years, he bought land, a lot of land, he
10:39:59 8 bought the domain names, he set up websites. So --

10:40:02 9 THE COURT: Things that might be inconsistent
10:40:04 10 with what he said in his declaration.

10:40:06 11 MR. SHELTON: Correct, your Honor. And something
10:40:08 12 that your Honor would be uniquely able to deal with
10:40:11 13 because they are, of course, equitable issues that are
10:40:14 14 solely for the province of this court.

10:40:17 15 THE COURT: Okay.

10:40:19 16 MR. SHELTON: But turning to our motion to
10:40:22 17 dismiss, your Honor, I just want to bring up a point. Mr.
10:40:25 18 McGann argued the point about the fact that three
10:40:29 19 defendant actors are required, and so, I won't belabor
10:40:31 20 that. But I do want to point out for Microsoft that
10:40:35 21 amendment here would be futile, and the reason is that if
10:40:40 22 there was ever an implausible claim of direct
10:40:43 23 infringement, it's this one. It may be the most
10:40:46 24 implausible one you've seen in a year and a half or
10:40:49 25 throughout your long distinguished career.

10:40:51 1 THE COURT: As a dog watching a television.

10:40:54 2 MR. SHELTON: Some people have said that, not
10:40:55 3 about you, your Honor, but about others.

10:41:00 4 And I just want to point out that the
10:41:02 5 implausibility in the complaint, I think, is highlighted
10:41:05 6 by something in the opposition of Mr. De La Vega, and that
10:41:09 7 is that the lawyers tried to introduce a new theory that
10:41:14 8 instead of the camera being in motion as required by all
10:41:19 9 three independent claims, they now say, citing a web
10:41:24 10 article from someplace in Indiana entitled, Why Do My
10:41:29 11 Hands Have a Nervous Tremor, that your hand moving while
10:41:33 12 you hold a phone and you're not in motion, that the very
10:41:37 13 slight tremor that every person has, that that's motion.
10:41:41 14 That is implausible and, more importantly, that wasn't in
10:41:45 15 the complaint.

10:41:45 16 In fact, I would say, your Honor, that's specious
10:41:48 17 and frivolous. And if your Honor does not dismiss the
10:41:52 18 complaint against Microsoft with prejudice, this is the
10:41:56 19 beginning of an exceptional case. The exceptional case
10:41:59 20 started when the complaint was filed. And I think we will
10:42:01 21 see frivolous allegations like that made in an amended
10:42:09 22 complaint if your Honor were to permit that.

10:42:11 23 But my hope is that we have an early bench trial
10:42:13 24 and deal with the case that way. Thank you, your Honor.

10:42:15 25 THE COURT: And, counsel, if you'll give me one

10:42:17 1 second. Josh.

10:43:25 2 Counsel, let me tell you what I'm thinking about
10:43:28 3 doing and tell me why this would not be the right thing to
10:43:32 4 do. Both -- I don't know that Mr. McGann said this, but
10:43:47 5 I'm sure he was thinking it, what Mr. Shelton said, which
10:43:49 6 was that it would be impossible for you to replead. If he
10:43:56 7 didn't say --

10:43:56 8 MR. O'FINAN: I can't hear you, your Honor. I
10:43:58 9 didn't hear that last word, your Honor.

10:43:59 10 THE COURT: Okay. Mr. Shelton suggested that it
10:44:02 11 would be impossible for you to replead.

10:44:05 12 MR. O'FINAN: To replead. Okay.

10:44:07 13 THE COURT: To adequately replead. Mr. McGann
10:44:09 14 probably thinks the same thing, even if he didn't
10:44:11 15 articulate it in exactly that way. And so, my plan is to
10:44:18 16 give you two weeks to prove them wrong and amend your
10:44:23 17 pleading.

10:44:26 18 The Court is going to -- when the Court receives
10:44:29 19 it, either I would like for you or your co-counsel, which
10:44:33 20 would be fine, or when Microsoft or Google gets it, if
10:44:37 21 someone will let our court know just that it's been filed.
10:44:40 22 We get a lot of filings and we aren't graded. You know, a
10:44:44 23 lot of stuff comes in, but once we get your pleading,
10:44:46 24 which will be two weeks, served on counsel, two weeks from
10:44:50 25 today and filed two weeks from today in court, the Court

10:44:53 1 is not going to wait for Microsoft and Google to have to
10:45:00 2 file anything. We're going to look at the pleading, and
10:45:05 3 if we find that it's deficient, we will probably dismiss
10:45:09 4 the case sua sponte.

10:45:11 5 I think Mr. McGann did a very good job of
10:45:16 6 highlighting for you the allegations that were not found
10:45:19 7 in the complaint. I'll give you an example. A method for
10:45:24 8 selecting streaming image content from a network
10:45:27 9 comprising not addressed in the complaint. Section that
10:45:31 10 begins with coupling, said realtime streaming image, goes
10:45:34 11 on, not addressed in the complaint, and the actors aren't
10:45:37 12 identified.

10:45:37 13 So basically you have a roadmap for what the
10:45:42 14 defendants say you are unable to do. Since you filed this
10:45:47 15 case, I'm going to presume you acted in good faith when
10:45:51 16 you filed it originally, and I'm going to assume that you
10:45:53 17 can prove these two fine lawyers incorrect by amending
10:45:58 18 your complaints satisfactorily. If you do prove them
10:46:02 19 wrong by amending your complaint in a manner that is
10:46:08 20 sufficient, then we will have a bench trial. I won't be
10:46:13 21 able to give you the date today, but it will be -- we are
10:46:16 22 booked pretty solid in April and May.

10:46:19 23 My deputy clerk just said, dear God, you can't do
10:46:22 24 this, but we will find a date -- she gets madder when I
10:46:28 25 sentence a lot of people because it means she has to do so

10:46:33 1 much work that she does the real work. But we're going to
10:46:36 2 set a bench trial on the inequitable conduct issue and
10:46:45 3 because that is -- I think three or four months, should
10:46:48 4 give both sides an adequate amount of time to do discovery
10:46:51 5 on the issue.

10:46:52 6 Does either -- do the defendants have -- have
10:46:58 7 they pled in their answers that this might be an
10:47:01 8 exceptional case?

10:47:03 9 MR. SHELTON: I don't -- well, we haven't
10:47:06 10 answered, your Honor. Microsoft has not. We just filed
10:47:09 11 the motion to dismiss, but certainly would have if we had
10:47:12 12 answered.

10:47:12 13 THE COURT: Well, if you answer and if Google
10:47:15 14 decides that they -- we'll do our best to get the motion
10:47:21 15 for transfer that accelerates it. We'll do our best to
10:47:25 16 rule on the motion to transfer and address that ahead of
10:47:29 17 time. If it's granted, then Google won't be at the trial.

10:47:33 18 But either way, I would have -- I would have pled
10:47:39 19 -- I would have made that option available to the Court if
10:47:41 20 the Court were to find that this were an exceptional case
10:47:45 21 after either problems with completion of the ability to
10:47:52 22 amend or after the bench trial. I think those factors
10:47:56 23 could still be found with respect to even the equitable
10:48:00 24 trial that we would have.

10:48:01 25 So counsel for De La Vega, tell me what about

10:48:09 1 that process you disagree with.

10:48:11 2 MR. O'FINAN: Well, first of all, your Honor, we
10:48:12 3 would object to the bench trial. I realize it's the
10:48:15 4 Court's call, but we object to that. We haven't had a
10:48:17 5 chance to respond to that in writing. And --

10:48:20 6 THE COURT: You'll have a chance.

10:48:22 7 MR. O'FINAN: I understand that, your Honor, but
10:48:24 8 I'm just saying, I want to be on the record, we object.
10:48:26 9 And I want to put on the record regarding this allegation
10:48:28 10 of inequitable conduct and this regard for the patent
10:48:34 11 office process. Now, they've the cited to the courts in
10:48:39 12 New York, in Michigan, they're not precedent-setting for
10:48:42 13 this court at all.

10:48:43 14 However, the Aristocrat Techs case is precedent
10:48:47 15 for this case. It came after the cases that they're
10:48:50 16 talking about. And the Federal Circuit essentially said,
10:48:55 17 look, guys, this is not what you should be getting
10:48:58 18 involved in. It's something that, you know, the patent
10:49:00 19 office has. It's a process. That's a legislative issue.
10:49:03 20 They've set up the rules and they follow their rules, and
10:49:07 21 to get into whether the patent office did or didn't do
10:49:10 22 their job correctly.

10:49:11 23 THE COURT: I don't think -- and Mr. Shelton
10:49:13 24 could correct me. I don't think he is -- the bench trial
10:49:18 25 is going to be about -- it's going to be an inequitable

10:49:24 1 conduct issue, is it not?

10:49:26 2 MR. SHELTON: That is correct, your Honor, and
10:49:27 3 prosecution laches.

10:49:28 4 THE COURT: And prosecution laches and that takes
10:49:30 5 it out of the concern I had, in my opinion, that I would
10:49:34 6 be grading the papers on how the administrative process
10:49:38 7 worked. That's why I'm suggesting we have a trial on this
10:49:41 8 issue where I can determine whether or not the inventor
10:49:46 9 did, in fact, act -- did or did not. I have no way of
10:49:50 10 knowing, but that's -- here's the point.

10:49:56 11 I'm leaving aside, at the moment, in setting that
10:50:01 12 trial the point that Google made. There is no question,
10:50:05 13 whether it be in three months or it be a year and a half
10:50:08 14 now from when the trial ordinarily would be, we would have
10:50:12 15 -- I'm assuming Microsoft is planning on making an
10:50:14 16 inequitable conduct affirmative defense, at some point,
10:50:18 17 correct?

10:50:18 18 MR. SHELTON: Yes, your Honor.

10:50:19 19 THE COURT: All I'm doing is making -- for the
10:50:22 20 record, since you're objecting -- and you have every right
10:50:24 21 to. I'm not quarreling with that. But I'm making
10:50:29 22 determination, which I think is not only within my power,
10:50:34 23 which I'm supposed to do, which is, what is the most
10:50:37 24 economically judicious way to handle this case?

10:50:40 25 I think the defendants have put on at least a --

10:50:44 1 I mean, I heard for all morning about how I should -- from
10:50:47 2 the plaintiff's side, why if they allege something, you
10:50:51 3 know, I should take it in consideration. The defendants
10:50:54 4 have made a colorable argument that they are going to
10:50:57 5 present an inequitable conduct claim.

10:51:00 6 I think it makes more economic sense to resolve
10:51:04 7 that, rather than have either side waste its time or the
10:51:09 8 Court's time on a Markman if that would within three
10:51:13 9 months resolve the case.

10:51:15 10 MR. O'FINAN: Your Honor, with all due respect to
10:51:17 11 the Court and to the opposition here, they're complaining
10:51:22 12 that they want this case dismissed because the complaint
10:51:24 13 is insufficient, yet, they come along and say this guy's
10:51:28 14 lying to the patent office, without any evidence
10:51:30 15 whatsoever, and that warrants a discovery and put this guy
10:51:34 16 through the gristmill but he's --

10:51:36 17 THE COURT: He's going to go through it, anyway.

10:51:38 18 MR. O'FINAN: Your Honor, but the allegation of
10:51:39 19 misconduct is baseless and it's not -- they cited -- he
10:51:44 20 tried to recite a fact which is not a fact. He's made an
10:51:47 21 allegation against somebody that he's saying, well, this
10:51:49 22 guy bought property. He has no idea how he acquired -- he
10:51:53 23 just says he owns property --

10:51:53 24 THE COURT: Counsel, exceptional case works both
10:51:55 25 ways.

10:51:56 1 MR. O'FINAN: Well, your Honor, he's making a
10:51:57 2 false allegation.

10:51:58 3 THE COURT: Well, if we -- you know, I think the
10:52:03 4 country's been through like three -- a week of that in the
10:52:07 5 Senate where no one seems to care what anyone says.

10:52:10 6 Here's what I care about in my courtroom. If you
10:52:14 7 bring a lawsuit that you shouldn't have brought, then you
10:52:19 8 are at some peril. If Microsoft and Google bring an
10:52:24 9 allegation of inequitable conduct that they shouldn't have
10:52:27 10 brought, then they're equally at peril. All I'm doing is
10:52:31 11 trying to figure out, what is the most efficient way to
10:52:34 12 resolve this case?

10:52:34 13 I'm not going to leave here today thinking
10:52:37 14 anything about your inventor, that he was a good or bad
10:52:40 15 person, or that anything that Mr. Shelton just said is or
10:52:43 16 is not correct. There will be a time and place for that.
10:52:48 17 It's going to be a trial, either in this courtroom or in
10:52:52 18 Waco, where Microsoft is going to get to put on evidence,
10:52:56 19 you're going to get to put on evidence, and at the end of
10:52:58 20 the day, one of you will win, and it may or may not be an
10:53:00 21 exceptional case for the loser.

10:53:03 22 That's all I'm saying. It's going to have to --
10:53:06 23 I'm going to have to decide that at some point, anyway.
10:53:09 24 It's not going to happen, and all I'm doing is expediting
10:53:13 25 it happening so that the Court doesn't lose time and the

10:53:17 1 parties don't lose time if that's the most efficient way
10:53:20 2 to do it.

10:53:21 3 Let me make clear, I'm not casting aspersions of
10:53:24 4 any kind on your client. I'm just -- I'm doing what I
10:53:31 5 think is the most efficient thing I can do. So you have
10:53:33 6 your objection.

10:53:34 7 MR. O'FINAN: Okay, Judge.

10:53:35 8 THE COURT: And you also have that in two weeks
10:53:38 9 from Friday, I anticipate -- I mean, it may be obviated.
10:53:45 10 There may not be a hearing if you all -- if Mr. Shelton
10:53:48 11 and Mr. McGann are correct that you can't adequately plead
10:53:52 12 this. I will be as clear as possible. I am very
10:53:56 13 skeptical that you can. We have looked at the patent,
10:54:01 14 everything that defense articulated. We've -- my clerk
10:54:06 15 and I have had exactly the same concerns as we looked at
10:54:11 16 the patent.

10:54:14 17 I don't want to go over and over this, but I
10:54:15 18 actually, you know -- they actually let me try these
10:54:18 19 cases, and I know what they're talking about. I've dealt
10:54:22 20 with these issues before and raised them on both sides. I
10:54:25 21 have the same concerns about your ability to adequately
10:54:29 22 plead that had been raised here.

10:54:32 23 I am an eternal optimist and I'm assuming you're
10:54:37 24 going to be able to address those concerns in the next two
10:54:39 25 weeks and file an amended complaint that adequately sets

10:54:43 1 forth all of the claims that you're supposed to do. But
10:54:48 2 that -- you know, can you do it or not? I don't know.
10:54:51 3 We'll see in two weeks.

10:54:52 4 MR. O'FINAN: We'll see, Judge.

10:54:53 5 THE COURT: And after that, you know, you're
10:54:55 6 going to have to go through infringement contentions and,
10:54:58 7 you know, present those, as well. I'm going to stay all
10:55:01 8 of that stuff until we have the bench trial. Nothing will
10:55:08 9 happen in this case other than your amending the
10:55:12 10 pleadings. We will review them and determine whether or
10:55:15 11 not they're adequate and whether the case remains extant.
10:55:20 12 If it does, then we'll be telling you when to come to
10:55:22 13 court for a bench trial on the issues of inequitable
10:55:26 14 conduct and laches.

10:55:30 15 MR. O'FINAN: Okay, Judge. Thank you.

10:55:31 16 THE COURT: Anything else?

10:55:32 17 MR. SHELTON: No, your Honor. Not from
10:55:33 18 Microsoft.

10:55:33 19 THE COURT: Mr. McGann, I don't know exactly
10:55:36 20 where that puts Google, who doesn't want to be here, and
10:55:40 21 so, y'all will have to figure out that. But if you would
10:55:44 22 like to come up here, along with Mr. Sanders, and I can
10:55:48 23 swear you in.

10:55:51 24 MR. HANSLEY: Your Honor, I'd like to address the
10:55:52 25 Court, if I may.

10:55:53 1 THE COURT: Okay. You may.

10:55:54 2 MR. HANSLEY: So in this case, we filed the cases
10:56:00 3 under a test theory. And so, the defendants are missing
10:56:04 4 the point completely. So on a direct infringement claim,
10:56:09 5 if there's multiple actors and you're claiming direct
10:56:14 6 infringement, then I get that there has to be some
10:56:17 7 direction or control. Usually you're under a contract to
10:56:19 8 do something, and that's the context that you see it in.

10:56:24 9 But whenever you test your product and you're a
10:56:28 10 big company like Google and Microsoft, and just as
10:56:33 11 Intellectual Ventures mentioned in their argument, they
10:56:36 12 have multiple layers of due diligence when they make a
10:56:41 13 product, they've been sued for patent infringement so many
10:56:44 14 times, they have whole groups within their company that
10:56:48 15 scour the USPTO website database, looking for something
10:56:53 16 that resembles what they're about to do. They probably
10:56:56 17 have records of that.

10:56:58 18 Also, they -- so they're able to do it in
10:57:11 19 litigation. They're able to do prior art searches. They
10:57:16 20 contract with firms that have third parties that do it for
10:57:19 21 a living. You could pay \$5,000 and have it done. And so,
10:57:27 22 I don't see why I would need to include a specific
10:57:30 23 instance of testing in the complaint because I don't have
10:57:35 24 to conclude a specific instance of a sale being made for
10:57:41 25 the sale of an infringing product. But we know that sales

10:57:44 1 are happening, and there's no requirement that I have to
10:57:47 2 buy the accused instrumentality to file the case.

10:57:50 3 And so, it's basically the same logic. You know
10:57:55 4 that a sale's happening because you see indicia of the
10:57:58 5 sale, but you didn't personally witness the sale of the
10:58:02 6 accused instrumentality, but you know it's happening. And
10:58:06 7 I know that testing is happening. I know these companies
10:58:10 8 are testing their product before they put it on the
10:58:13 9 market. It would be a DTPA in Texas if they didn't do so
10:58:17 10 because, inevitably, it would not work.

10:58:20 11 And, frankly, Google has a history of rushing to
10:58:23 12 market. We all know that. But I don't think they rush
10:58:27 13 that much. They don't make a product and just say, well,
10:58:32 14 we hope this works.

10:58:33 15 THE COURT: So the universe of infringement that
10:58:36 16 you think you'll be able to prove is that Microsoft and
10:58:39 17 Google tested this product before it went on --

10:58:39 18 MR. HANSLEY: They test the product --

10:58:45 19 THE COURT: -- and that's the universe of the
10:58:45 20 amount of infringement you're going to be able to show?

10:58:48 21 MR. HANSLEY: They tested the product and but
10:58:50 22 for testing the product --

10:58:50 23 THE COURT: I get that, but I'm saying that's the
10:58:52 24 amount of infringement you're going to be able to show is
10:58:57 25 when Google and Microsoft were testing the product --

10:59:00 1 you're going to go to trial and ask for damages against
10:59:04 2 Google and Microsoft because, assuming you're right, they
10:59:09 3 did this in a manner where before they released the
10:59:12 4 product and they were testing it -- what is your theory of
10:59:15 5 damages?

10:59:16 6 MR. HANSLEY: Before I answer your question, in
10:59:20 7 this country, we're allowed to sue somebody for spitting
10:59:22 8 on us and that's a battery. A civil battery. I learned
10:59:26 9 that in law school. You can sue somebody for spitting on
10:59:29 10 you.

10:59:30 11 THE COURT: Why don't you answer my question.

10:59:32 12 My question was, I'm going to -- just for sake of
10:59:35 13 argument. Let's presume that Microsoft and Google both
10:59:40 14 did what you said they did and infringed your patent
10:59:43 15 during the process of coming up with theirs -- their
10:59:46 16 product. What is your damage theory?

10:59:50 17 MR. HANSLEY: My damage theory -- and I've had it
10:59:53 18 somewhat litigated in the Eastern District of Texas. I
10:59:56 19 had motion to dismiss filed based on no testing
11:00:00 20 allegations in the complaint, and it was a test read in
11:00:04 21 the Eastern District of Texas. Just to give you a history
11:00:06 22 of --

11:00:06 23 THE COURT: I don't need a history. I want to
11:00:08 24 know what your -- I want to know how you would prove a
11:00:14 25 quantum of damages because Google tested their product.

11:00:18 1 How much money would you get in a royalty for that?

11:00:22 2 MR. HANSLEY: Well, we haven't retained a damages
11:00:24 3 expert yet, but I --

11:00:24 4 THE COURT: What do you think? What would you be
11:00:26 5 asking for if you came in and proved that Microsoft and
11:00:30 6 Google had actually once or twice tested this and that was
11:00:33 7 the entire universe of their infringement?

11:00:37 8 MR. HANSLEY: Respectfully, your Honor, I'm not
11:00:39 9 an economist. I'm an electrical engineer undergrad and I
11:00:44 10 graduated cum laude from SMU Law School.

11:00:48 11 THE COURT: But I need an answer to my question.
11:00:51 12 And here, I mean, I allow -- you asked if you could speak
11:00:53 13 and you could. Again, if you were to prove that they did
11:01:05 14 that, would it be infringement? Maybe it would. I can't
11:01:09 15 imagine the damages theory on that.

11:01:14 16 MR. HANSLEY: But for the testing, they wouldn't
11:01:16 17 put out a product.

11:01:18 18 THE COURT: Right. Okay. At any rate, how is
11:01:26 19 that germane to anything that I said?

11:01:30 20 MR. HANSLEY: I'm sorry?

11:01:32 21 THE COURT: How is what you raised with me
11:01:34 22 germane to anything I said about what we're going to do?
11:01:38 23 What was the point in you telling me that?

11:01:42 24 MR. HANSLEY: Of the damages?

11:01:45 25 THE COURT: What was the point of you telling me

11:01:47 1 that you think they infringed while they were testing?

11:01:52 2 MR. HANSLEY: Because they are -- because you're

11:01:55 3 going to have us replead, and I feel like we can't really

11:01:59 4 replead and do any better. We have screen shots in the

11:02:03 5 complaint of -- we had our Rule 11 charts in the complaint

11:02:07 6 with pictures and text describing their product, like

11:02:12 7 perfectly.

11:02:12 8 THE COURT: Well, then, how about this solution.

11:02:15 9 If you are telling me you can't do any better.

11:02:19 10 MR. HANSLEY: We could always do better but I --

11:02:21 11 THE COURT: I'm hoping you can because if what

11:02:23 12 you're saying is you can't do any better, then I'm going

11:02:27 13 to just dismiss the cases now. Because if you want to go

11:02:32 14 with what you have pled right now, I will -- I'll tell you

11:02:38 15 what. That's what I'm going to do. I'm going to take you

11:02:44 16 at your word that you can't do any better. I'm going to

11:02:46 17 find that the pleadings that you have are inadequate.

11:02:49 18 MR. HANSLEY: Well, I didn't --

11:02:50 19 THE COURT: And I'm going --

11:02:51 20 MR. HANSLEY: I didn't say I can't do any better.

11:02:53 21 THE COURT: And I'm going to dismiss your cases

11:02:55 22 and you can take them up. That's all I have.

11:03:00 23 Gentlemen, I will swear you in at this time.

11:03:04 24 (End of proceedings.)

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UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, LILY I. REZNIK, Certified Realtime Reporter,
Registered Merit Reporter, in my capacity as Official
Court Reporter of the United States District Court,
Western District of Texas, do certify that the foregoing
is a correct transcript from the record of proceedings in
the above-entitled matter.

I certify that the transcript fees and format comply
with those prescribed by the Court and Judicial Conference
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WITNESS MY OFFICIAL HAND this the 6th day of February,
2020.

/s/Lily I. Reznik
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